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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHOBY LOVELL,

Defendant and Appellant.

G049176

(Super. Ct. No. 12NF2794)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Loleena H. Ansari, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton, Minh U. Le and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Anthony Lovell appeals from the judgment following his guilty plea to counts alleging aggravated assault (Pen. Code, § 245, subd. (a)(1); all further statutory references are to this code) and battery causing serious bodily injury. (§ 243, subd. (d).) In exchange for his plea, he received a sentence of five years in prison. Defendant contends the trial court abused its discretion by denying his motion to withdraw the plea, and also by failing to continue the hearing on his motion so that he could secure “effective representation” after his counsel allegedly acknowledged an inability to advocate on his behalf. He obtained a certificate of probable cause.

We affirm. In order to establish good cause for withdrawal of a plea, defendant was required to demonstrate that his plea was the product of some factor – e.g., mistake, fraud, duress – which overcame his exercise of free judgment. Here, defendant claims the trial court erroneously rejected his contention that his plea was the product of duress caused by abusive conditions within the jail. However, the trial court was entitled to rely on its own observations in determining whether defendant was under duress when he entered his plea, and it did so explicitly in rejecting this claim. Moreover, because defendant’s evidence demonstrated those same allegedly abusive conditions were ongoing at the time he sought to *withdraw* his plea, the trial court did not abuse its discretion in concluding those described conditions had not overcome his ability to exercise free judgment.

Additionally, we find no error in the trial court’s failure to order a continuance of the hearing to explore whether defendant should be assigned new counsel to advocate on his behalf. Neither defendant nor his counsel expressed any desire to terminate their attorney-client relationship, and neither explicitly sought a continuance. Further, counsel’s statement that he could not disclose in open court the conversations he had with defendant regarding the “Three Strikes” law ramifications of his plea did not reflect any inability to advocate on defendant’s behalf. Instead, it merely reflected counsel’s understanding of the restrictions imposed by the attorney-client privilege.

Given the court's clear statement that its own advisements to defendant in connection with taking the plea had been sufficient to inform him properly of the plea's Three Strikes law consequences, the court did not abuse its discretion by failing to continue the hearing.

FACTS

Defendant was charged with felony counts of mayhem (§ 203), aggravated assault (§ 245, subd. (a)(1)), and battery causing serious bodily injury. (§ 243, subd. (d).) It was further alleged as an enhancement that he had inflicted great bodily injury on his victim (§ 12022.7, subd. (a)), including brain injury and paralysis (§ 12022.7, subd. (b)), and that he had one prison prior. (§ 667.5.)

On September 18, 2013, defendant pleaded guilty to the counts alleging aggravated assault and battery causing serious bodily injury, and admitted to inflicting great bodily injury on his victim. He also admitted to one prison prior. In exchange for his plea, he was to be given a stipulated sentence of five years in prison, and the mayhem charge and the enhancement alleging infliction of brain injury and paralysis were dismissed. His sentencing hearing was scheduled for October 11.

At the sentencing hearing, defendant made an oral motion to withdraw his plea, and submitted a written statement setting forth the basis of his motion. In that statement, defendant set forth two justifications for withdrawal of the plea: First, he claimed he "took a plea with the understanding two strikes would be counted as one[;] not knowing that even though it is two strikes for one victim it still puts me under the 'three strikes' law. For even a 'wobbler' strike. I am asking to you the honorable judge and the courtroom to forgive my misunderstanding and allow me to 'pull' my plea." And second, he explained that due to circumstances inside the jail he "would like to claim that I was under duress do [sic] to treatment and abuse inside the county jail." The

circumstances he described included: being “thrown in a ‘homosexual’ holding tank with no clothes and fresh blood all over the walls”; that “[his] lunch sacks have been missing meat, bread, fruit, basically the bare minimum inmates receive to stay alive and healthy”; and that “d[ue] to guards coming in my cell snatching up my pillow from under my head and calling me names such as faggot, nigger, [A]frican gook in the [T]heo [L]acy facility I am scared for my safety.” He explained that he had “signed that deal hoping it would all end that day.” He also informed the court that “just recently,” he “was threatened that the cops were going to slam my head against the toilet and ‘fuck’ me . . . after [I asked] why my program is being taken away from me.”

The trial court addressed defendant’s two justifications for relief in the order presented. It first asked defendant to clarify what his concerns were concerning application of the Three Strikes law to his case. Defendant indicated his attorney “had explained to me, he said that for all purposes – all sentencing purposes that two strikes would be one.” The court then pointed out that was not what the court itself had explained to defendant on the record when it took his plea; and not what defendant had agreed to in writing. The court noted that because the two strikes to which defendant pleaded guilty were committed against the same victim, it was likely they would “be counted as one strike” although it could not promise that.

The court then addressed defendant’s counsel, characterizing defendant’s motion as consisting of “that legal issue . . . contained in the first couple of lines,” while the rest of it is “based on things that were happening elsewhere that have nothing to do with advisements, your representation, things like that.”

At that point, defendant’s counsel mentioned he was somewhat restricted as to what he could relate in open court about “conversations I had with my client, how I advised him.” He went on to state in general terms: “[defendant] and I have talked at length about my advisements and conversations we’ve had and the strike laws and how this could be handled in the future. Beyond that, I don’t have anything else to add.”

The court then said, “I am prepared to find that there is not good cause to even continue this matter to bring the motion,” noting that defendant’s claimed misunderstanding of the Three Strikes law implications was “contrary to the *voir dire* that I take in a plea.” The court emphasized it had also done an “additional oral advisement of strike consequences on the record,” which was not even required.

Defendant’s counsel then focused the court on the second aspect of defendant’s motion to withdraw, his claim of duress stemming from jail conditions. The court then countered that this claim of duress was “contrary to . . . my observations, and his answers to me, right? [¶] Because obviously, if any of those were objectively outwardly visible, you would have brought them to this court’s attention as an extremely capable lawyer, and you could have just asked me for some additional time knowing in almost all likelihood, I would have granted that. I would have asked him those . . . questions.” Defense counsel responded, “Right.”

The court also invited defendant to offer anything further in support of his motion, and after some colloquy, stated “I do not believe that good cause has been shown to withdraw the plea or even put this matter over to address that point.” The court then summarized the two grounds for relief, explaining why it viewed each as having no merit. At that point, defendant’s counsel harkened back to the issue of how he had advised defendant on the Three Strikes law issue, stating “[t]he only other thing I would add would be I’m not intending to stand in the way of perhaps a *Marsden* situation or a conflict if someone were to inquire of me what the discussions were, and at this time I’m not at liberty to do that, so I can’t offer anything more at this point.” The court responded that it would treat that statement as a proffer for a motion to continue, but deemed it unpersuasive, “because I’m balancing that against the other facts that I know in this case, since much of that involves the way the plea was taken and his understanding, whether or not it was a knowing and voluntary waiver, and the like. [¶] And . . . so I’m not inclined to continue this matter.”

DISCUSSION

1. Applicable Law

Section 1018 governs the withdrawal of a plea. It states that “[o]n application of the defendant at any time before judgment . . . , the court may . . . , for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” The burden is on the defendant to establish, by clear and convincing evidence, good cause for withdrawal of his plea. (*People v. Williams* (1998) 17 Cal.4th 148, 167; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 917; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) Good cause is demonstrated if the defendant establishes the plea was the product of “mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment.” (*People v. Ravaux*, at p. 917.) On the other hand, “[p]leas are not set aside simply because defendants change their minds.” (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1143.)

Thus, the fundamental issue to be addressed by the court in deciding whether to allow a defendant to withdraw his plea is whether “the defendant did not exercise free judgment in entering into the plea.” (*In re Vargas, supra*, 83 Cal.App.4th at p. 1142.)

“A decision to deny a motion to withdraw a guilty plea “rests in the sound discretion of the trial court” and is final unless the defendant can show a clear abuse of that discretion.” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) Moreover, “[i]t is entirely within the trial court’s discretion to consider its own observations of the defendant in ruling on such a motion. [Citation.] The court may also take into account the defendant’s credibility and his interest in the outcome of the proceedings.” (*People v. Ravaux, supra*, 142 Cal.App.4th at p. 918.)

And of course, “we ‘must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . If the circumstances reasonably justify the trial court’s findings, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding.’” (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.)

2. Denial of Motion to Withdraw Plea

Defendant challenges the court’s denial of his motion to withdraw his plea, focusing exclusively on the court’s rejection of his claim of duress. He claims the court abused its discretion because the evidence demonstrated his “will was overborne by inordinate pressure to escape unsafe conditions in county jail” and because the court’s “exercise of discretion was founded on erroneous facts.” Neither claim is persuasive.

Defendant’s first argument simply assumes that because there was sufficient evidence to support his claim of mistreatment in jail, the court was obligated to view that evidence both as credible and as convincing evidence of his duress at the time he agreed to plead guilty. But that is not the case. First, the court was not obligated to believe defendant’s claim of mistreatment. “[T]he trial court on a contested motion to withdraw a plea of guilty . . . is the trier of fact and hence the judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences.” (*People v. Quesada, supra*, 230 Cal.App.3d. at p. 533.) And as the trier of fact, the court is not obligated to believe defendant’s factual assertions, even if uncontradicted by other evidence. (*People v. Silva* (2001) 25 Cal.4th 345, 369 [“A rational trier of fact could disbelieve those portions of defendant’s statements that were obviously self-serving”].) Thus, the mere fact that defendant claimed he had been mistreated in jail did not obligate the trial court to find that true.

But even assuming the court believed defendant's description of his treatment in jail, we have no trouble concluding the record nonetheless supports its court's rejection of his claim of duress. Duress is not established merely because defendant's poor treatment while in jail made him highly motivated to get out of there as soon as possible. Rather, duress requires a determination that the circumstances had such a severe effect on defendant that they actually overcame his "exercise of free judgment." (*People v. Ravaux, supra*, 142 Cal.App.4th at p. 917.) And the trial court's assessment of that issue may rely heavily on its own observation of the defendant's demeanor when taking his plea. In this case, the trial court explicitly stated that its denial of the motion was grounded largely on its own observation of defendant. Indeed, defendant's own counsel conceded that defendant had exhibited no sign he was under duress at the time he entered his plea. The evidence of defendant's demeanor during his plea was a sufficient basis for rejecting his assertion that he was operating under duress at that time.

Finally, we note that defendant's own description of his treatment in the jail, offered in support of his motion to withdraw his plea, undermined his claim of particular legal duress at the time he pleaded guilty. What he describes is not a period of escalating mistreatment that culminated in his plea; instead, without actually specifying dates, he implies that only the first incident, in which he was thrown into the "'homosexual' holding tank" occurred just before he pleaded guilty. It's not clear when some of other described incidents occurred, but he clearly states that the final incident, in which he was told "the cops were going to slam my head against the toilet and 'fuck' me" occurred "just recently." He summarizes by stating, *in the present tense*, "I don't feel safe in the county jail." All of this suggests the alleged campaign of harassment waged against defendant in the county jail had not yet abated as of the date he sought to *withdraw* his plea. The fact that both his decision to plead guilty, and his later effort to withdraw that plea both occurred while he was subject to ongoing harassment in the jail, undercuts his claim that the harassment overcame his ability to exercise free judgment.

Instead, it strongly suggests he simply changed his mind. As that is not a valid justification for withdrawing a plea, we conclude the court did not abuse its discretion by rejecting his motion.

Defendant's second argument fares no better. He contends the court's exercise of its discretion was based on an erroneous understanding of the facts. Specifically, defendant focuses on the fact that in assessing his motion to withdraw his plea, the court did not initially recall that he had asked to be sentenced immediately after the court entered his plea. Instead, the court questioned whether the decision to delay sentencing had been at defendant's request – "then why did we put your sentencing over, because you asked to have it put over?" – which would undercut defendant's claim that he had been desperate to leave the jail. However, that misunderstanding was immediately cured by defendant's counsel, who reminded the court that delaying sentencing had been the court's idea, not defendant's: "We had put it over to allow the alleged victim or his family to come in and address the court to comply with Marsy's Law." The court responded "I stand corrected on that point." Hence, by the time the court denied the motion, its initial misunderstanding as to the reason for delaying defendant's sentencing had been corrected.

Moreover, as the trial court noted, while defendant had asked to be sentenced immediately following his plea, he ultimately agreed to waive his right to immediate sentencing. That agreement seems inconsistent with defendant's contention that his plea was borne entirely out of his overwhelming need to be get out of the jail right away. And while it is also true, as defendant points out, that the court had given him little choice but to agree to that waiver after it took the plea ("Sir, if you don't want to waive that in all likelihood I'm going to overrule your objection. I'm going to put your sentencing over to that October 11th date"), there is no indication that defendant was anything more than annoyed by the unexpected delay. His response was "All right. Yes." Significantly, neither defendant nor his counsel so much as hinted to the court that

defendant's decision to plead guilty was effectively conditioned on his expectation of leaving the jail that very day – or why he felt it was necessary that he do so. On this record, we cannot say the court abused its discretion by impliedly concluding that defendant's failure to explain his need for an immediate transfer out of the county jail at the time he pleaded guilty undermined his later claim of duress.

3. Failure to Continue Hearing on Motion to Withdraw Plea

Defendant next argues the court also erred because it failed to order a continuance of his motion to withdraw his plea, after his appointed trial counsel indicated he could no longer function as “an *active* advocate” on defendant's behalf in connection with the motion. We cannot agree with defendant's characterization of his trial counsel's stance, and thus find his argument unpersuasive.

Defendant's motion to withdraw stated two grounds. In addition to his claim of duress, he also asserted that he had “[taken] a plea with the understanding two strikes would be counted as one[;] not knowing that even though it is two strikes for one victim it still puts me under the ‘three strikes’ law. For even a ‘wobbler’ strike. I am asking to you the honorable judge and the courtroom to forgive my misunderstanding and allow me to ‘pull’ my plea.”

The statements of counsel which defendant relies upon to demonstrate counsel's alleged unwillingness to advocate on his behalf were in connection with that first argument – defendant's purported misunderstanding of the strike consequences of his plea. At the hearing, the trial court asked defendant to clarify what his concerns were concerning application of the Three Strikes law to his case. Defendant indicated his attorney “had explained to me, he said that for all purposes – all sentencing purposes that two strikes would be one.” The court then pointed out that was not what the court itself had explained to defendant on the record when it took his plea; and not what defendant had agreed to in writing. The court stated that because the two strikes to which defendant

pleaded guilty were committed against the same victim, it was likely they would “be counted as one strike” although it could not promise that.

At that point, defendant’s counsel mentioned he was somewhat restricted as to what he could relate in open court about “conversations I had with my client, how I advised him.” He went on to state in general terms: “[defendant] and I have talked at length about my advisements and conversations we’ve had and the strike laws and how this could be handled in the future. Beyond that, I don’t have anything else to add.”

The court then said “I am prepared to find that there is not good cause to even continue this matter to bring the motion,” noting that defendant’s claimed misunderstanding of the Three Strikes law implications was “contrary to the *voir dire* that I take in a plea.” The court then emphasized it had also done an “additional oral advisement of strike consequences on the record,” which was not even required.

After the court summarized the two grounds for relief, explaining why it viewed each as having no merit, defendant’s counsel harkened back to the issue of how he had advised defendant on the Three Strikes law issue, stating “[t]he only other thing I would add would be I’m not intending to stand in the way of perhaps a *Marsden* situation or a conflict if someone were to inquire of me what the discussions were, and at this time I’m not at liberty to do that, so I can’t offer anything more at this point.” The court responded that it would treat that statement as a proffer for a motion to continue, but deemed it unpersuasive, “because I’m balancing that against the other facts that I know in this case, since much of that involves the way the plea was taken and his understanding, whether or not it was a knowing and voluntary waiver, and the like. [¶] And . . . so I’m not inclined to continue this matter.”

When a defendant believes his appointed counsel is providing ineffective assistance, he may file “what is commonly called a *Marsden* motion” (*People v. Smith* (2003) 30 Cal.4th 581, 604) after *People v. Marsden* (1970) 2 Cal.3d 118, asking to have that counsel relieved and substitute counsel appointed. In order to prevail on a *Marsden*

motion, “[a] defendant must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel [citation], whether because of his attorney’s incompetence or lack of diligence [citations], or because of an irreconcilable conflict [citations]. We require such proof because a defendant’s right to appointed counsel does not include the right to demand appointment of more than one counsel, and because the matter is generally within the discretion of the trial court.”

(*People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1.)

Defendant suggests his counsel’s reference to a possible conflict, or a “*Marsden* situation,” in explaining why he was “not at liberty” to reveal the substance discussions with defendant about the plea meant that counsel was declining to advocate on his behalf, and thus obligated the trial court to continue the hearing to give defendant time to pursue a motion to have his counsel relieved. We cannot agree. In context, it is clear that defendant’s counsel was merely informing the court that while he had advised defendant about the consequences of his plea, those discussions were privileged and could not be disclosed in open court. And counsel’s reference to both a potential *Marsden* situation and a potential conflict implied that revealing the substance of those conversations would not necessarily assist defendant in his motion to withdraw the plea.

In any event, the trial court made clear that it believed its own advisement to defendant regarding the strike consequences of his plea had been sufficient, without regard to what counsel may or may not have said to him. Consequently, the court could easily conclude that even assuming defense counsel’s own advisement had been in some way deficient, that deficiency had been cured. Under those circumstances, the court did not abuse its discretion by declining to continue the motion so that defendant could pursue a motion to have new counsel appointed.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.